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4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**

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7 THOMAS BENSON and LYNN BENSON,

8 Plaintiffs,

9 v.

10 MIKELLE CIERI; NEVADA  
11 DEPARTMENT OF FAMILY SERVICES;  
12 and CANDACE SAIP *in her individual*  
13 *capacity*;

Defendants.

Case No. 2:19-cv-00727-RFB-BNW

**ORDER**

14 **I. INTRODUCTION**

15 Before the Court are Plaintiffs Thomas Benson and Lynn Benson's application for leave to  
16 proceed in forma pauperis and two motions for preliminary injunctions. ECF Nos. 1, 5, 6. For the  
17 following reasons, the Court denies all motions and applications.

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19 **II. PROCEDURAL BACKGROUND**

20 Plaintiffs sued Defendants and moved for leave to proceed in forma pauperis on April 29,  
21 2019. ECF Nos. 1, 1-1. Plaintiffs now move for a preliminary injunction, filing two separate  
22 motions for the same relief. ECF Nos. 5, 6.

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24 **III. FACTUAL BACKGROUND**

25 Plaintiffs allege that the Nevada Department of Family Services took custody of Plaintiffs'  
26 minor child in July 2017 after Plaintiff Thomas Benson was arrested in his home, leaving the minor  
27 child with two other adults at the home. The Family Division of the Eighth Judicial District Court  
28

1 of Nevada held a hearing in October 2018. At the hearing, Plaintiffs challenged whether the court  
2 had jurisdiction. The court, however, found that it had jurisdiction and considered the placement  
3 of the minor child.

#### 4 5 **IV. LEGAL STANDARD**

##### 6 **a. Screening Standard**

7 Federal courts must conduct a preliminary screening in any case in which a prisoner seeks  
8 redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.  
9 § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims  
10 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek  
11 monetary relief from a defendant who is immune from such relief. See 28 U.S.C.  
12 § 1915A(b)(1),(2). Pro se pleadings, however, must be liberally construed. Balistreri v. Pacifica  
13 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a  
14 plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution  
15 or laws of the United States, and (2) that the alleged violation was committed by a person acting  
16 under color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

17 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation  
18 Reform Act (PLRA), a federal court must dismiss a prisoner's claim if "the allegation of poverty  
19 is untrue" or if the action "is frivolous or malicious, fails to state a claim on which relief may be  
20 granted, or seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.  
21 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted  
22 is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard  
23 under § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a  
24 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the  
25 complaint with directions as to curing its deficiencies, unless it is clear from the face of the  
26 complaint that the deficiencies could not be cured by amendment. See Cato v. United States, 70  
27 F.3d 1103, 1106 (9th Cir. 1995).

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1 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See Chappel v.  
2 Lab. Corp. of America, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim is  
3 proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that  
4 would entitle him or her to relief. See Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999). In  
5 making this determination, the Court takes as true all allegations of material fact stated in the  
6 complaint, and the Court construes them in the light most favorable to the plaintiff. See Warshaw  
7 v. Xoma Corp., 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to  
8 less stringent standards than formal pleadings drafted by lawyers. While the standard under Rule  
9 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere  
10 labels and conclusions. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A formulaic  
11 recitation of the elements of a cause of action is insufficient. Id.

12 Additionally, a reviewing court should “begin by identifying pleadings [allegations] that,  
13 because they are no more than mere conclusions, are not entitled to the assumption of truth.”  
14 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the framework  
15 of a complaint, they must be supported with factual allegations.” Id. “When there are well-pleaded  
16 factual allegations, a court should assume their veracity and then determine whether they plausibly  
17 give rise to an entitlement to relief.” Id. “Determining whether a complaint states a plausible  
18 claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its  
19 judicial experience and common sense.” Id.

20 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte*  
21 if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based  
22 on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit  
23 or claims of infringement of a legal interest which clearly does not exist), as well as claims based  
24 on fanciful factual allegations (e.g., fantastic or delusional scenarios). Neitzke v. Williams, 490  
25 U.S. 319, 327 – 28 (1989); see also McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

#### 26 **b. Preliminary Injunction**

27 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a  
28 clear showing that the plaintiff is entitled to such relief.” Winter v. Natural Res. Def. Council,

1 Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, a plaintiff must establish four  
2 elements: “(1) a likelihood of success on the merits, (2) that the plaintiff will likely suffer  
3 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its  
4 favor, and (4) that the public interest favors an injunction.” Wells Fargo & Co. v. ABD Ins. & Fin.  
5 Servs., Inc., 758 F.3d 1069, 1071 (9th Cir. 2014), as amended (Mar. 11, 2014) (citing Winter, 555  
6 U.S. 7, 20 (2008)). A preliminary injunction may also issue under the “serious questions” test.  
7 Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011) (affirming the  
8 continued viability of this doctrine post-Winter). According to this test, a plaintiff can obtain a  
9 preliminary injunction by demonstrating “that serious questions going to the merits were raised  
10 and the balance of hardships tips sharply in the plaintiff’s favor,” in addition to the other Winter  
11 elements. Id. at 1134–35 (citation omitted).

## 12 13 **V. DISCUSSION**

14 As a preliminary matter, Plaintiffs have failed to comply with 28 U.S.C. § 1915(a)(2) and  
15 with Local Rule LSR 1-2, which requires any application to proceed in forma pauperis to include  
16 an inmate account statement and a financial certificate. Further, the complaint is signed only by  
17 Plaintiff Thomas Benson, but alleges to be on behalf of both plaintiffs. Pursuant to Rule 11 of the  
18 Federal Rules of Civil Procedure, the Court strikes the complaint in its entirety as to any claims  
19 alleged only by Plaintiff Lynn Benson. Fed. R. Civ. P. 11(a) (“Every pleading . . . must be signed  
20 . . . by a party personally if the party is unrepresented . . . [t]he court must strike any unsigned paper  
21 unless the omission is promptly corrected.”).

22 Plaintiffs seek to enjoin a family court proceeding before the Nevada state court, arguing  
23 the family court lacks jurisdiction. Plaintiffs allege the following constitutional violations:

24 First, Plaintiffs allege a Sixth Amendment violation of Plaintiff Lynn Benson’s right to  
25 counsel due to the family court hearing master’s refusal to allow a non-attorney to represent Lynn  
26 Benson at a hearing on October 3, 2018. Plaintiffs also allege a Sixth Amendment violation of  
27 Plaintiff Lynn Benson’s right to a jury trial and a First Amendment violation against Defendant  
28 Mikelle Cieri for accusing Plaintiff Lynn Benson of “threats and harassment” to Plaintiffs’ minor

1 child “by using scripture and the fear of God.” Plaintiffs also allege a loss of consortium claim  
2 against Defendants because Plaintiff Lynn Benson may only speak with the minor child once a  
3 week. Plaintiffs further allege that Defendant Cieri’s refusal to send the minor child to stay with  
4 relatives in the Philippines violates “[Plaintiff’s] right to be secure in her property—[minor child]-  
5 and in violation of international law.” Plaintiffs further allege that they have experienced denial of  
6 their parental liberties, which the Court construes to be a substantive due process claim. Plaintiffs  
7 also allege as part of their substantive due process claim that Defendant Candace Saip has brought  
8 fraud upon the Court because she has not proved that the family court has jurisdiction.

9 **a. Sixth Amendment Right to Counsel**

10 The Court strikes this claim as it is made only on behalf of Plaintiff Lynn Benson, who has  
11 not signed the complaint pursuant to Rule 11. The Court also notes that there is no Sixth  
12 Amendment right to counsel in family court proceedings in which a party’s liberty is not at stake.  
13 Lassiter v. Dep’t Soc. Serv., of Durham Cty., N.C., 452 U.S. 18, 25 (1981).

14 **b. Sixth Amendment Right to Jury Trial**

15 The Court strikes this claim as it is made only on behalf of Plaintiff Lynn Benson, who has  
16 not signed the complaint pursuant to Rule 11. The Court also notes that neither the United States  
17 Constitution nor the Nevada Constitution guarantee a right to a jury trial in termination of parental  
18 rights proceedings. In re Parental Rights as to M.F., 371 P.3d 995, 997 –1000 (Nev. 2016).

19 **c. First Amendment Violation**

20 The Court strikes this claim as it is made only on behalf of Plaintiff Lynn Benson, who has  
21 not signed the complaint pursuant to Rule 11.

22 **d. Loss of Consortium**

23 The Court strikes this claim as it is made only on behalf of Plaintiff Lynn Benson, who has  
24 not signed the complaint pursuant to Rule 11.

25 **e. Substantive Due Process**

26 Finally the Court addresses Plaintiffs’ substantive due process rights claim. Parents have a  
27 substantial due process liberty interest in the “companionship, care, custody and management” of  
28 their children. Brittain v. Hansen, 451 F.3d 982, 992 (9th Cir. 2006) (internal citations omitted).

1 To allege a substantive due process claim, a party must allege facts showing that an officer acting  
2 under color of law acted in some way to “shock the conscience.” Id. at 991.

3 Plaintiffs allege that Defendants violated their liberty interests in access to their child by  
4 failing to prove that the state court had jurisdiction over the family court proceeding and by  
5 refusing to allow their minor child to stay with relatives in the Philippines. The Court dismisses  
6 this claim because Plaintiffs have not alleged that this conduct shocked the conscience, or that it  
7 was “intended to injure in some way unjustifiable by any government interest.” Id. (citing Cty. of  
8 Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).

9 Because the Court has dismissed all claims in this case, all of Plaintiff’s motions are denied.

10 **VI. CONCLUSION**

11 **IT IS ORDERED** that Plaintiffs’ Motion/Application for Leave to Proceed in Forma  
12 Pauperis is DENIED.

13 **IT IS FURTHER ORDERED** that Plaintiffs’ Motions for Injunction (ECF Nos. 5 and 6)  
14 are DENIED

15 **IT IS FURTHER ORDERED** this matter is dismissed without prejudice.

16 The Clerk of the Court is instructed to close the case.

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18 DATED: October 4, 2019.

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21 **RICHARD F. BOULWARE, II**  
22 **UNITED STATES DISTRICT JUDGE**  
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